Supreme Court, U.S.
FILED
04-799 DEC 6 - 2004
OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

Mary Ann Smania
Petitioner

v.

Sherwin Abrams, *Attorney*
Abrams and Chapman, *Law Firm*
Lawrence Benjamin, *Attorney*
Lawrence Richman, *Attorney*
Neal, Gerber and Eisenberg, *Law Firm*
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Mary Ann Smania
Petitioner, Pro Se
15815 Acorn Circle
Tavares, Florida 32778
(352) 343-8517

Question Presented For Consideration

The basic issue presented for consideration to this court is the constitutionality of 28 USC § 2072. (28 USC § 2403(a) may be applicable. The question was not certified to the Attorney General pursuant to 28 USC 2403(a).)

I. Does the "circular" authority conferred by acts of Congress enabling the Judiciary to make and enforce its own rules violate the principle of the Separation of Powers as dictated by the Constitution? Alternately, is it within the Court's discretion, under Constitutional standards, to delegate its enforcement power to nongovernmental disciplinary entities, including state bar associations?

II. Does the word "duty," as it appears in the context of the Rules of Court, impose a legal obligation to the Court when applied to members of the bar, or would such an interpretation violate that class's due process rights?

III. Is application of the "safe harbor" provisions of the Rules of Court constitutional when the Court is called upon to consider allegations of perjury by the parties?

IV. Can an attorney or a law firm publish privileged communication to protect itself from accusations of wrongful conduct without violating a client's Fifth Amendment right to protection from self incrimination when the relevancy of the communication has not been previously established by the Court through an evidentiary proceeding?

List of Parties

The caption for this petition includes the parties to the Eleventh Circuit Court of Appeal. The Circuit Court was also petitioned to assert supervisory jurisdiction over the Respondents' attorneys. The Florida law firm of Shutts & Bowen put in its notice of appearance on behalf of Respondents Sherwin Abrams and Abrams & Chapman..

The Florida law firm of Baker & Hostetler did not put in a notice of appearance in the Eleventh Circuit but had noticed the United States Middle District of Florida of its appearance in that court on behalf of Defendants/Respondents Lawrence Benjamin, Lawrence Richman and Neal, Gerber, & Eisenberg. (DE 51, P. 2)[1]

---

[1] References to Documents, not in the Appendix, will be referred to by their docket entry number in the United States Middle District of Florida. "(DE #)"

Table of Contents

Questions Presented.....i

List of Parties.....ii

Table of Contents.....iii

Index of Authorities.....v

Petition For Writ of Certiorari.....1

Citation of Opinions and Orders.....1

Basis for Jurisdiction.....2

Statutory Provision Involved.....2

Constitutional Provisions Involved.....3

Statement of the Case.....3

Summary of Argument.....14

Argument.....16

I. The decision of the Circuit Court to ignore Petitioner's Questions of First Impression raises serious doubt as to the effectiveness of the Appellate Process in exercising supervisory jurisdiction over the errant behavior

of the Court's own officers.....16

II. The Court should give meaning to the Rules of Court by defining the word "duty."..... 19

III. The Court should declare the safe harbor provisions embodied in the rules of court unconstitutional....21

IV. The Court should condemn, as unconstitutional, the practice of publication of privileged information by an attorney or a law firm to protect the attorney or the law firm from accusations of wrongful conduct, without the expressed authority of the Court 27

Conclusion.....30

Appendix Separately Bound

Index of Authorities

Cases

Anti-Fascist Committee v. MCGrath, 341 U.S. 123 (1951)...29

Carter v. Carter Coal Co., 298 U.S. 238 (1936).....25

Cooter & Gell v. Hartmarx Corp. 496 U.S. 384 (1990)....19, 20

Jones v. Clinton, 206 F. 3d 811 (8th Cir. 2002).....23

Keller v. State Bar of California et al., 496 U.S. 1.....26

Marbury v. Madison, 1 Cranch, 137 (1803).....15

Miller v. Fenton, 474 U.S. 104 (1985).....20

Pierce v. Underwood, 487 U.S. 552 (1987).....20

Roell v. Withrow, ____U.S.____. 123 S.Ct. 1696 (2003).....18
(Justice Thomas Dissenting).....19

Rostker v. Goldberg, 453 U.S. 57 (1981).....29

United States v. Oregon State Medical Society, 343 U.S. 326
(1952).....20

Statutes and Rules

18 USC § 1621.....23

28 USC § 331.....17

28 USC § 332 (d)(4).....17

28 USC § 636.....6, 18

28 USC § 636 (c.).....5, 6

28 USC § 636 (c)(1).....19

28 USC § 1254 (1).....2

28 USC § 1332.....2

28 USC § 2071 (a).....17

28 USC § 2072.....*passim*

28 USC § 2403(a).....i

Eleventh Cir.R. 28-1(i.)(ii.).....14

Fed.R.Civ.P. 1.....21, 24

Fed.R.Civ.P. 4.....4

Fed.R.Civ.P. 4(d)(2).....4, 5, 7, 8, 9, 20

Fed.R.Civ.P. 11.....*passim*

Fed.R.Civ.P. 11 (b)(1)(2)(3).....9

Fed.R.Civ.P. 11 (b)(4).....24

Fed.R.Civ.P. 11(c)(1)(A).....10, 11, 22, 23

Fed.R.Civ.P. 11(c)(1)(B).....24, 25

Fed.R.Civ.P. 12.....9

Fed.R.Civ.P. 52.....20

Fed.R.Civ.P. 55(a)(b)(2).....7

Fed.R.Civ.P. 73.....5, 6, 18

Fed.R.Civ.P.77(a).....11

FRAP 46 (c).....13

M.D.Fla.Loc.R. 3.01(g).....10, 11

Supreme Court Rule 6.....29

United States Constitutional Provisions

Articles I, II, III.....*passim*

Article I, Section 1 & 3.....2

Article II, Sections 1 & 2.....2, 23

Article III, Section 1.....2, 26

Fifth Amendment.....2, 12, 28

Other Authorities

ABA Model Code of Professional Responsibility (2003)
DR 4-101 (C).....27
DR 4-101 (D).....27

ABA Model Rules of Professional Conduct,
Preamble.....18

Advisory Committee Notes, (1993) *Fed. Rules of Civil Procedure*.....25

Black's Law Dictionary (5th & 7th Ed.).....23

Declaration of Independence, (1776).....14, 15

Federalist, Paper No. 10 (1787).....10

Gonzalez, Albert R., "Letter to the ABA," March 22, 2001....26

Manual For Complex Litigation, Second, § 42.3.....25

Model Penal Code, Section 241.1.....23

Scalia, Antonin, *A Matter of Interpretaion- Federal Courts And The Law*, Princeton University Press, (1997).....19

Senate S. 3086 (1996).....17

Petition For Writ of Certiorari

The failure to address Petitioner's arguments by both the District Court and the Circuit Court in a way which would have allowed the Pro Se Petitioner to proceed with legal counsel has exposed a compromise in the system of checks and balances embodied in the Separation of Powers. This Constitutional breach raises serious concern for the Judiciary's independence as a separate but equal branch of government. This Court should grant this Petition for Writ of Certiorari to give legal meaning to the role of the Court in governing its own behavior.

Citation of Opinions and Orders

The Eleventh Circuit's opinion of affirmation is unpublished. "App. B" The Eleventh Circuit's order denying Motion for Rehearing En Banc is unreported. "App. A" Also unreported are Magistrate's order denying the Petitioner's Certificate of Interested Persons, "App. J," the Magistrate's stamped endorsed order granting an extension of time for two of the Defendants, "DE 23," the District Court's order vacating the Magistrate's order to extend time and issuing a new order, "App. I," the Magistrate's omnibus order denying Petitioner's Motions for Default Judgments against four of the five defendants, as well as her Motion to Recover Costs For Service, her Renewed Motion to Recover Costs, her Motion For a More Definitive Statement, and her Motion to Strike Declaration of Lawrence Benjamin, "App. H," the District Court's order to the Petitioner to Show Cause as to why the case should not be dismissed, App. G, the District Court's order to deny Petitioner's Motion for Certification of an Interlocutory Appeal and Motion to Compel, "App.F," the District Court's *de* novo review of the Magistrate's

orders and omnibus order reformulating Petitioner's Motion For Certification of an Interlocutory Appeal and her memorandum, as well as all of her other motions into "objections" of the Magistrate's orders and overruling the "objections," "App. E," the District court's order granting Defendants' motions for dismissal, "App. D," and the District Court's Denial of the Petitioner's Motion for Reconsideration, "App. C."

Basis For Jurisdiction

The 11th Circuit Court's denial of the Petitioner's Motion For Rehearing En Banc was delivered on September 8, 2004. Petitioner invokes this Court's jurisdiction under 28 USC § 1254(1).

Statutory Provision Involved

28 USC § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c.) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Constitutional Provisions Involved

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. (Article I, Section 1)

The executive power shall be vested in a President of the United States of America... [The President] shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. (Article II, Sections 1, 2)

The Senate shall have the sole power to try all impeachments. (Article I, Section 3)

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish (Article III, Section 1)

[No person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. (Amendment V)

Statement of the Case

The Petitioner Pro Se, Mary Ann Smania, "Smania," a citizen of Florida, filed a legal malpractice lawsuit pursuant to 28 USC § 1332 and Article III subsection 2 of the United States Constitution, written in the narrative, in the United States Middle District of Florida against three attorneys and two law firms sited in Illinois. (DE 1) In seeking relief the Petitioner apologized for

her clumsiness with legalese and asked the Court for leave to amend the complaint so that she could proceed as represented by competent legal counsel in Florida. Smania is not a lawyer.

Smania's father had died in 1998 a resident of Florida. Smania was his only child, only heir at law, and sole income beneficiary of a trust established by her father when he was alive. Smania was also named a Fiduciary trustee of the trust by her father upon his demise, which probate was opened in Florida by the executor of her father's estate under the legal supervision of a Florida law firm. However, through a set of circumstances settled in an Illinois Probate Court, Smania had also assumed the additional Fiduciary position of successor Executor of her father's estate just prior to filing her complaint in Florida's Middle District. (DE 1 - Text)

Under pressure from the statute of limitations and mindful of the fact that she could not represent either an estate nor a trust in Florida pro se, Smania sued the defendants as the sole heir of the estate and sole income beneficiary of the trust, expecting that competent Florida legal counsel would be welcomed by the court to amend the complaint and represent Smania in her Fiduciary capacities. As stated in her complaint, Smania was no longer associated with the Florida law firm that opened the probate in Florida, but was represented by counsel in Illinois. (DE 1 - Text)

In lieu of serving a summons, Smania elected to notice each defendant of the lawsuit through the procedure outlined in Rule 4 (FRCP), which states in pertinent part that, "An individual, corporation, or association that is subject to service under subdivision (e),(f) or (h) and that receives notice of an

action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons." (Emphasis Added) (Fed.R.Civ.P. 4(d)(2)).

As a non-lawyer, Smania believed that the word "duty" meant that the defendants, all of whom are members of the bar, were legally obligated to avoid unnecessary costs of serving a summons. The gist of her cause of action was simple. The defendants had put Smania in harms way with the IRS.

Shortly after Smania noticed each of the defendants, the District Court sent a form letter to Smania that summarized a "program" through which jurisdiction could be given to a magistrate in accordance with the provisions of 28 USC § 636(c). The letter explained that if she decided to decline consent that fact "would be held in confidence by the Clerk." Accompanying the form letter were blank consent forms which stated in clear English that pursuant 28 USC 636(c) and Fed.R.Civ.P. 73, Smania could withhold her consent to jurisdiction from the magistrate "without adverse consequences."

The assigned magistrate was the same magistrate who had presided over a district court case in which Smania had attempted to introduce cameras into the court. He had reported her to the Florida Bar for her association with the pro se litigant in that case, Norma Vaughan, who had brought her social security appeal to the district court. Smania reasonably felt it was in her best interest to withhold jurisdiction from that particular magistrate. Therefore, when Smania filed her response to an "Order On Interested Persons and Corporate Disclosure," she stated her belief that the assigned magistrate would not be impartial and should recuse himself from the case. (DE 4) The

clear language assurance of no adverse consequences in both Fed.R.Civ.P 73 and 28 USC § 636 led Smania to envision an automatic recusal by the assigned Magistrate through which the Clerk would simply refer the case to another Magistrate. However, that did not happen. Instead, Smania was unexpectedly ordered to appear before the Magistrate. (DE 7)

Also convoluting the process was the fact that four of the five defendants had apparently decided not to timely comply with their "duty" to avoid the costs of serving a summons. Their behavior was described by Smania in an affidavit. (DE 13) Two of the defendants, Abrams & Abrams and Chapman, finally accepted service personally (DE 9 &12). Defendants Richman and Benjamin, on the other hand, avoided service of the summons by the process server, who finally left their summonses with the secretary of their law firm. (DE 10 & 11)

Shortly thereafter Defendant Abrams, who is not a member of the Florida Bar, filed a notice of appearance in the United States Middle District of Florida (DE 14). Abrams wrote a letter to Smania stating, "Contrary to the statements in your affidavit of March 11, 2003, my law firm and I did comply with **our duty** under Rule 4 of the Federal Rules of Civil Procedure." (DE 15) Neither Abrams nor his law firm appeared or were represented at the hearing scheduled by the Magistrate. The other defendants were represented by the Florida law firm of Baker & Hostetler. (DE 51, P. 2, L. 8-10)

At the hearing, the Magistrate confronted Petitioner with what she had written about him, revisited their previous entanglement in the Vaughan case, and argued with her as to the correct interpretation of Rule 73 (FRCP) and 28 USC § 636. The

Magistrate refused to recuse himself with the words,. "In this case I do find that I have a **strong duty** to sit." (DE 51, P. 35, L 4-5)

> "As far as an invalid delegation of power to the Florida Bar, I delegated no power to the Florida Bar. I, I simply referred the matter for them to exercise their **own independent power** because it's Florida, the Florida Bar and not this Court that has the primary responsibility for unauthorized practice of law matters." (DE 51, P. 30, L 6)

The next day, unbeknownst to Smania, Defendants Richman and Benjamin filed a motion to extend their time to respond to the complaint to "April 31, 2003." Their motion was referred to the Magistrate. (DE 17) Since Smania was unaware that a motion to extend time had been filed, she did not address it when she applied for default judgments, pursuant to Fed.R.Civ.P. 55(a)(b)(2), against Richman and Benjamin as well as Abrams and his law firm, Abrams & Chapman. (DE 18, 19, 20, 21) At that time Defendant Neal, Gerber & Eisenberg was not in default since they had timely returned the waiver. (DE 8)

Upon learning about the Richman-Benjamin motion to extend time, Smania filed a formal motion to recover costs of service from Richman and Benjamin specifically, pursuant to Fed.R.Civ.P. 4(d)(2), concentrating her argument on the clear language of the rule that required Richman and Benjamin to show "good cause" for their non-compliance in performing their duty to the court. (DE 25) On the same day, apparently, Abrams and his law firm, as represented by the Florida law firm of Shutts & Bowen, who had not put in a notice of appearance previously, motioned the court to dismiss the case for lack of personal jurisdiction. (DE 26) The motion was grounded in a bare bones

affidavit made by Abrams generally denying the allegations of the legal malpractice suit. (DE 26, Exhibit A) Absolutely no reference was made to Smania's application for a default judgment against them.

The next day, apparently, Defendant Benjamin filed a forty-five page document, entitled "Declaration of Lawrence Benjamin," made under penalties of perjury, which attached letters Smania had written to Richman and Benjamin while under the impression that she was a client of their law firm, Neal, Gerber, & Eisenberg. (DE 29, Exhibits A & B) The Benjamin Declaration was incorporated by the three Defendants in their motion to dismiss apparently filed simultaneously in a separate document, which argued in part that Benjamin and Richman had never been properly served. (DE 27) By that time Neal, Gerber & Eisenberg was already in default. (DE 8)

Further complicating the issues before the Court, the previous day the Magistrate, via stamped endorsement, had granted the Richman-Benjamin motion to extend time (DE 23) with no attention paid to Smania's motion made pursuant to Fed.R.Civ.P. 4(d)(2) nor her application for default judgments against the noncompliant defendants. The next day, the presiding judge, who also was the chief judge, recused herself from the case vacating all orders she had previously issued on the grounds she had a financial arrangement with one of the attorneys involved in the case. (DE 32) Up to that point Smania was the only party who had filed a "Certificate Of Interested Persons." (DE 4) In the meantime the new presiding judge vacated the magistrate's order to extend Richman and Benjamin's time because "April does not have 31 days" and issued a new order which extended their time to May 1, 2003. (App. I) Again, no reference was

made to any of Smania's motions.

The next week Smania renewed her motion previously made pursuant Rule 4 (d)(2). Her renewed argument was grounded in the "spirit of the law" embodied in Fed.R.Civ.P. 11(b)(1)(2)(3)" which reflects the concept that there is a legal obligation for members of the bar to act honorably toward the court. Attached to Smania's motion were exhibits which clearly should have alerted the court to the fact that Defendant Benjamin had lied under penalties of perjury. (DE 43, Exhibits) Also, Smania simultaneously filed a separate motion to strike the Benjamin Declaration, pursuant to Fed.R.Civ.P. 12, on the grounds that it was impertinent and scandalous. (DE 45) Smania asserted, inter alia, that the publication of her letters written while under the expectation of privilege violated the rule governing evidentiary procedure. She encouraged the Court to use its supervisory discretion to severely sanction Benjamin and the Florida law firm representing him, Baker & Hostetler. In the Motion to Strike, Smania attached additional documentation supporting her contention that Benjamin asserted facts, under penalties of perjury, which were blatantly false. (DE 45, Exhibits)

Also on that day, in a separate filing, Smania challenged the Abrams' barebones affidavit with a motion to require him to expand his statements made under oath. (DE 44) Smania noted that Abrams had previously filed an affidavit in the Illinois court which had reflected a substantively different posture. Smania, however, did not attach a copy of the affidavit Abrams filed in the Illinois court.

Benjamin and Richman responded by stating, in pertinent

part, that Smania had not "conferred" with Benjamin and Richman pursuant to Local Rule 3.01(g) before filing her motions. (DE 46) Defendants Neal, Gerber & Eisenberg did not respond nor did Abrams, or Abrams & Chapman. However, it should be noted that the Abrams' legal representative had previously certified to the court the blatantly false assertion that there were no related cases in Illinois or elsewhere. (DE 39)

Exactly one month and a day after the magistrate refused to recuse himself, he denied all of Smania's motions by highlighting Smania's admitted lack of skill in applying legalese, reformulating her arguments and effectively declaring them moot, and categorizing the Benjamin Declaration as having full force and effect under the law. (App. H) No consideration was given to any of the documentation presented by Smania that misrepresentations in their affidavits and motions had been articulated by the defendants and their lawyers. The Magistrate, allegedly after "careful review," stated he did not find anything scandalous or impertinent. The Magistrate's discussion of Rule 4(d)(2) was limited to the fact that although Smania had filed a motion pursuant to said rule she did not comply with Local Rule 3.01(g). Absolutely no reference was made by the Magistrate to the "spirit of the law" embodied in Rule 11(FRCP) despite his discussion of the "law" espousing the theory that default judgments against the defendants would interfere with their due process rights.

Apparently emboldened by the magistrate's decisions, Richman and Benjamin filed two more documents berating Smania's "defective" ability to adequately articulate procedural and substantive argument in the court. (DE 49 & 50). And finally, in one last footnote, they claimed that Smania had violated

the "safe harbor provision of Federal Rule of Civil Procedure 11(c)(1)(A)." (DE 50, Footnote 4)

Shortly after Richman and Benjamin's memoranda claiming substantive and procedural defect in Smania's filings, Smania noticed the court that she was withdrawing any inferred consent to the Magistrate's jurisdiction and was going to apply for an Interlocutory Appeal to address the legal contextual meaning of the word **"duty."** (DE 52) Smania expressed her concern that three months had passed since she filed the law suit and her sincere efforts to follow the rules and effectuate an orderly process had been met with resistance at all junctures. Smania attached to the memorandum an exhibit of the docket as it had been formulated when she initially responded to the Benjamin- Richman motion to extend time as an example of her concern. (DE 52, Exhibit B) The docket, at that time, did not memorialize the magistrate's refusal to recuse himself. Instead, at a point subsequent, an order to deny Smania's "Certificate of Interested Persons" was entered. That order not only obfuscated the numbering references on motions Smania had filed, but also insinuated that Smania exemplified a class of unreasonable litigants. "The Court does what it can to accommodate *pro se* litigants." (App. J)

Smania motioned the District Court to Certify an Interlocutory Appeal pursuant to Fed.R.Civ.P 77(a) on May 15, 2003. (DE 54)

Two weeks passed, and with no acknowledgement of Smania's Motion to Certify an Interlocutory Appeal, the Court threatened Smania with dismissal stating that she had not filed a case management report required by Local Rule 3.10. (App. G)

Smania responded by directing the court's attention to a copy of a letter she had previously filed (DE 35, Exhibit A) in which she specifically requested that the attorneys cooperate with her to fulfill the requirements of the local rule. (DE 56) She simultaneously filed a motion to compel response to her motion for certification of an interlocutory appeal. (DE 57) Benjamin, Richman, and Neal, Gerber & Eisenberg responded in pertinent part by claiming her motion was "patently insufficient." (DE 58) Abrams and Abrams & Chapman did not respond at all.

The day after Benjamin, Richman, and Neal, Gerber & Eisenberg responded, the Court denied Smania's motion for certification of an interlocutory appeal and reformulated it into an objection to the Magistrate's orders. Her motion to compel was declared moot. However, the court informed the parties that it, and not the magistrate, would assume jurisdiction over the Defendants motions for dismissal after a "*de novo* determination on the issues based upon the complete record." (App. F)

Two days later the court reformulated all of Smania's motions and her certificate of interested persons into "objections" of the Magistrate's orders and then, in one full swoop, "overruled" the objections it had just created. (App. E) It simultaneously granted all of the defendants motions to dismiss, stating in pertinent part that "the Court [considered] whether the exercise of personal jurisdiction over the Defendants [comported] with due process under federal constitutional law." (App. D). The court did not acknowledge any of Smania's Rule 11 argument nor gave any consideration to the fact that Smania provided documentation of the defendants' false statements and misrepresentations. The Court ignored Smania's concern that her 5th Amendment rights had been compromised when the defendant

attorneys disclosed her privileged communication without the prior authority of the court.

Smania timely motioned for a reconsideration on the grounds that the court had determined erroneous facts as "uncontroverted evidence." (DE 63) Abrams and Abrams & Chapman responded that they acknowledged the disputed fact, but it did not change their position regarding grounds for dismissal (DE 64). Benjamin, Richman, and Neal, Gerber & Eisenberg did not respond at all. The court denied Smania's motion for reconsideration, stating that even if it had made the purported factual error it would not change its conclusion to dismiss the case. (App. C)

Smania appealed to the 11th Circuit. On August 1, 2003, Smania timely filed her Appellant's brief in the United States 11th Circuit Court of Appeal. Jurisdiction was sought in part pursuant to FRAP 46(c), which gives the Circuit Court disciplinary jurisdiction over the attorneys who practice before it. The brief detailed, on a day by day basis, the activity which had ensued in the District Court, and argued that a double standard had been applied which resulted in an abuse of discretion suborning perjury and the unethical publication of privileged communication.

Richman, Benjamin, and Neal, Gerber & Eisenberg did not answer nor did their legal representatives file a notice of appearance. Shutts & Bowen, acting on behalf of the Abrams respondents, apparently sought an extension of time and then filed a brief which essentially avoided the issues Smania argued.

On September 20, 2003, Smania timely filed her reply brief. The gist of the reply brief was that the author of the answer

brief had devised a false record through a convoluted scheme of referencing in violation of 11th Cir.R. 28-1(i.)(ii.), which strategy of convolution echoed his and his clients' behavior in Florida's Middle District Court.

On February 4, 2003, a panel for the U.S. Court of Appeal for the 11th Circuit rendered a decision that determined facts not in evidence and affirmed the lower court's dismissal of the case. (App. B) No consideration was given to the issues actually argued by Smania.

Smania motioned the Circuit Court for a Rehearing En Banc. Eight months passed. Then, on September 8, 2004, Smania's motion was denied because "no Judge in regular active service on the court [requested] that the court be polled on rehearing en banc." (App. A)

Summary of the Argument:

Article III of the *United States Constitution*, as adopted on September 17, 1787, vests judicial power in the Supreme Court and "in such inferior courts as the Congress **[not the Judiciary]** may from time to time ordain and establish." The framers did not delineate any behavioral responsibilities for the judiciary, although it did for the executive and legislative branches in Articles I and II of the Constitution

The onus of moral responsibility in the exercise of government by its officers was defined eleven years prior:

> "But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to

> reduce them under absolute Despotism, **it is their right, it is their duty**, to throw off such Government, and to provide new Guards for their future." (Emphasis Added) (*Declaration of Independence*, Adopted by the Second Continental Congress, July 4, 1776)

On February 24, 1803, the United States Supreme Court, by a vote of 5-0, defined the legal obligation of the judiciary as an institution of governance in this country:

> "It is emphatically **the province and duty of the judicial department to say what the law is.** Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." (emphasis added) (*Marbury v. Madison*, 1 Cranch, 137, 177 (1803))

Seventy-five years later, on August 21, 1878, the American Bar Association ("ABA") was founded.

It is the Petitioner's argument that the process of judicial review, wherein the Judiciary adjudicates the constitutionality of acts of the Legislative and Executive Branches, while maintaining an amorphous immunity to judicial review of its own behavior, is in and of itself unconstitutional. Further, the Petitioner argues that the traditional relationship that the Judiciary has maintained with the ABA, and its affiliate state bars, violates the Separation of Powers. This Petition for Writ of Certiorari should be granted by the Court to either restore a self correcting mechanism compatible with a Constitutionally formulated independent Judiciary or to release its supervisory jurisdiction over members of the bar to the Attorney General of the United States.

Argument

I. The decision of the Circuit Court to ignore Petitioner's Questions of First Impression raises serious doubt as to the effectiveness of the Appellate Process in exercising supervisory jurisdiction over the errant behavior of the Court's own officers.

The Magistrate demonstrated that separation of powers is what one judge sitting in a court room says it is no matter what the founders may have intended. The Magistrate had a material interest in portraying the Petitioner as unreasonable to the Court. However, instead of recusing himself, he facilitated a denigration of the Court's integrity by its own officers, which denigration was upheld by both the District Court and the Circuit Court.

James Madison, in his discussion of the potential danger of the excessive abuse of power which may occur in the legislature if there is not an effective system of checks and balances, had this to say about a fundamental principle of a free society:

> "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time...."(*Federalist* paper no. 10, 1787)

Unfortunately, the attitude that the "courts" belong to the people who administer them, and not to "We, The People," is not unique to the Magistrate challenged in this case. In 1996, United

States Supreme Court Justice, David Souter, stated to a Senate Subcommittee, "The day you see a camera come into **our** courtroom it's going to roll over my dead body." (Emphasis added) (S. 3086, as reported in *Roundup,* Fall 2000 (Vol. 24, No. 4, Page 37))

The Rules Enabling Act, 28 USC § 2072, provided the Judiciary with a unique power. The District Courts promulgate their own rules and procedures under the authority of 28 USC § 2071(a), but the rules are not reviewed by a separate branch of government. Instead, they are reviewed by the Judicial Council, pursuant to 28 USC § 332(d)(4), which is made up of the chief judge and an equal number of judges from the circuit and district courts. The Judicial Council follows the lead of the Judicial Conference, which is established under 28 USC § 331, and is administrated by the Chief Justice of the United States. The Judicial Conference exercises its authority to review and amend the rules under an ambiguous authority known as Chapter 16. "The Conference is authorized to exercise the authority provided in Chapter 16 of [Title 28] as the Conferenee." In other words, in the Judiciary, the same people who make the rules regarding the functioning of judicial actors also enforce those rules. Thus, it is highly unlikely that an "outsider" can initiate judicial review of judicial behavior in the context of litigation. However, at the very heart of the judiciary is judicial review.

There is no avenue available to litigants to petition Congress to review a concerted discretionary abuse of the rules, albeit unconscious, in the context of litigation. The parties must rely on the integrity of the Appellate Process for a system of checks and balances to work in the Judicial Branch.

However, because the Appellate Court has the "ultimate" power to "say what the law is," the law can be whatever is convenient to those members of the bar who control the court at any period in time despite what Congress says the law is or how rights are defined in the Constitution.

The magistrate, at the time of his heavy handed determination to undermine the Petitioner's standing in this case was only one actor. He was concertedly joined by other judicial officers in the District Court to keep the Petitioner's standing on unequal footing. These "officers" included the chief judge, the presiding judge and the attorneys, including the defendants, all of whom are members of the bar. (See Preamble to *ABA Model Rules of Professional Conduct*, (1), "A lawyer,.....an officer of the legal system....having special responsibility for the quality of justice...."; See also ABA Website, *How A Court Works*, www.abanet.org, "The lawyers for both sides are also officers of the Court." (Emphasis in the original)

In the District Court the Petitioner was vehement about withdrawing jurisdiction from the Magistrate. However, unbeknownst to the Petitioner, two weeks prior to the District Court's decision to overrule "Smania's objection" to the magistrate's jurisdiction, the United States Supreme Court, by a vote of 5 to 4, held that consent to a Magistrate's jurisdiction can be "inferred from a party's conduct during litigation." (*Roell v. Withrow*, ____U.S.___, 123 S.Ct. 1696 (2003)) Despite the provisions of the plain language statute, as applied to 28 USC § 636 and Fed.R.Civ.P. 73, which require signatory expressive consent to a magistrate's jurisdiction, the Court rationalized that "there is good pragmatic reason to think that Congress intended to permit consent."

Justice Clarence Thomas dissented. "In my view, this interpretation of §636(c)(1) is contrary to its text, fails to respect the statutory scheme, and raises serious constitutional concern." *Ibid.* Justice Thomas was joined by Justice Stevens, Justice Kennedy, and Justice Scalia. It should be noted that Justice Scalia previously expressed the dissenting sentiment in an essay published six years prior to the decision in *Roell.*

> "[There] have always been, as there undoubtedly always will be, willful judges who bend the law to their wishes....But whether life-tenured judges are free to revise statutes and constitutions adopted by the people and their representatives is not merely [a] question of some "importance," but a question utterly central to the existence of democratic government. (*A Matter Of Interpretation-Federal Courts and the Law,* by Antonin Scalia, Princeton University Press, (1997), p.131, 133)

II. The Court should give meaning to the Rules of Court by defining the word "duty."

28 USC § 2072 appears to rationalize an incestuous system of checks and balances. This unique immunity from constitutional standards has been employed by the United States Supreme Court to protect the discretionary function of the judicial actors in the District Court over the rights of the parties to litigation. In a decision delivered by Justice O'Connor in *Cooter & Gell v. Hartmarx Corp,* 496 U.S. 384, 402, 403, 404, (1990) the Court stated:

In considering whether a complaint was supported by law

and fact "to the best of the signer's knowledge, information, and belief," a court must make some assessment of the signer's credibility. Issues involving credibility are normally considered factual matters. See Fed. Rule Civ. Proc. 52; see also *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952).

[T]he Court indicated that "'as a matter of the sound administration of justice'" deference was owed to the "'judicial actor...better positioned than another to decide the issue in question.'" *Pierce v. Underwood*, 487 U.S. 552, at 559-560, quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts' ability from the **duty** of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation. (Emphasis added)

Interesting word, "duty." It appears abundantly in the opinions of the Court and in the ABA's *Compendium of Professional Responsibility*. However, it is not in the Constitution and does not appear to be enforceable in the context of the *Federal Rules of Court* as amended to May 21, 2002.

In its decision to affirm the District Court's dismissal of Smania's lawsuit, the 11th Circuit took it upon itself to imply to the Petitioner that the "duty," as stated in Fed.R.Civ.P. 4(d)(2) to

avoid costs of serving a summons was unenforceable even though all the rules were followed to their letter regarding service of a summons on at least two of the Defendants.

So why define a behavior as a duty in the rules of court when the judicial officers, including attorneys who are the repeat players in the system, know that said "duty" is nothing more than an insignificant obscurity. This Court must define the word "duty" as an enforceable legal obligation, and exert its personal supervisory jurisdiction over members of the bar.

III. The Court should declare the safe harbor provisions embodied in the rules of court unconstitutional.

Through 28 USC § 2072 Congress has empowered the Court to promulgate its own rules. However, there is no rule which requires adherence to the Constitution. Instead the rules facilitate unscrupulous manipulation of the Constitution.

Indeed, Fed.R.Civ.P. 1 identifies the purpose of the rules as being economic in nature. "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Is this what the framers intended? Eighty-six rules, infinite cross referencing, thousands of local rules, and over thirty-five forms to make the administration of justice fast and cheap? Or do the rules simply concentrate the Judiciary's power in members of the legal profession who are repeat players, giving them an advantage over *pro se* litigants not schooled in the art of obfuscation?

Florida's Middle District has rules purporting to control attorney behavior. However, when two of the attorney defendants, Abrams and Benjamin, filed documents directly into the Middle District of Florida, the District Court did not subject them to its personal supervisory jurisdiction, pursuant to Fed.R.Civ.P. 11. Despite Smania's argument regarding the spirit of law embodied therein and her documentation of the falsity of the lawyers' representations, Rule 11 and the local rules were ignored. Instead, the Court denied personal supervisory jurisdiction, which denial was supported by the Appellate Court by avoiding the issue of what purpose Rule 11 is intended to serve. Additionally, the Circuit Court not only denied personal supervisory jurisdiction over the defendant attorneys but their attorneys as well.

Fed.R.Civ.P. 11(c)(1)(A) states in pertinent part:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but **shall not be filed with or presented to the court** unless, within 21 days after service of the motion (or such other challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. (emphasis added)

When Smania motioned the District Court pursuant to the "spirit of the law embodied in Rule 11," she encouraged the court to impose sanctions, and she also claimed, in her Appellate Brief, that it was incumbent on the Circuit Court to impose sanctions. Because the District Court believed it was Illinois and not Florida that had a material interest in the alleged legal

malpractice of the Defendants, the Defendants' attorneys, who were all members of the Florida Bar, were literally "forgiven" their participation in what transpired in Florida's Middle District. Which court has personal jurisdiction over them? Certainly not Illinois and certainly not the Florida Bar, despite what the magistrate may think regarding the Bar's independent power.

Perjury is a crime. (18 USC § 1621) A crime is a "social harm that the law makes punishable." *Black's Law Dictionary*, 7th Edition. In a monarchy, a crime is an offense against the crown. In a republic, such as ours, a crime is an offense against the people. "A positive or negative act in violation of penal law; an offense against the State or United States. *Black's Law Dictionary*, 5th Edition.

Model Penal Code, Section 241.1 states:

> "A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truths of a statement previously made, when the statement is material and he does not believe it to be true."

Once perjury has been committed, the deed has been done. No other officers of government, including, but not limited to, former President William Jefferson Clinton, have safe harbor to withdraw from the court's purview an intentionally formulated false or misleading statement made under penalty of perjury. (See *Jones v. Clinton*, 206 F.3d 811 (8th Cir. 2002))

So, why can attorneys get together, pursuant to Fed.R.Civ.P. 11(c)(1)(A), and make a deal to cover-up alleged

perjurious statements and the material effects they have on the consciousness of the court? Because, according to the Advisory Committee Notes on 1993 amendments to Rule 11 (FRCP), "The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1." In other words, the court has delegated its power to litigants and/or their attorneys to settle allegations of perjury so that the administration of justice can be fast and cheap.

There is something else distressing about Rule 11. That is the direction it gives to the court to facilitate perjury.

No officer of the judiciary has pardon power. Article II, Section II of the United States Constitution gives pardon power to the executive branch only. However, through Rule 11 the Judiciary has usurped that power.

Fed.R.Civ.P. 11 states in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresentative party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on the lack of information or belief. Fed.R.Civ.P. 11(b)(4)
>
> On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party

to show cause why it has not violated subdivision (b) with respect thereto. Fed.R.Civ.P. 11(c) (1)(B)

There is no directive stating what the court **shall do** when confronted with **blatantly perjurious written statements.**

The 1993 Amendment advisory notes for Rule 11 state:

> The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; **referring the matter to the disciplinary authorities** (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head, etc.) See *Manual for Complex Litigation, Second,* § 42.3." (Emphasis Added)

The court cannot delegate its powers to a nongovernmental adjudicating body. It violates the principle of Nondelegation and is invalid. (See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) "[It is delegation] in its most obnoxious form, for it is not even delegation to an official or an official body, presumably disinterested, but to private persons whose interest may and are adverse to others in the same business.")

Under the current administration the Executive Branch of government has begun to recover some of its power previously delegated to the privately financed Bar.

> "There is a long tradition by which Members of Congress, interest groups, and individual citizens provide

> suggestions to the President about potential judges. We will continue to welcome such suggestions from all sources, including the ABA.....But considerations of sound constitutional government suggest that the President not grant a preferential, quasi-official role in the judicial selection process to a politically active group." (Letter to ABA from Albert R. Gonzalez, then Counsel to the President, George W. Bush, dated March 22, 2001, breaking the tradition that the ABA evaluation committee screens candidates for federal court judgeships prior to nomination. Available at www.whitehouse.gov/news/releases)

Article III of the United States Constitution vests judicial power in the Supreme Court and those "inferior" courts as the Congress appoints, not as the Judiciary appoints. The Bar Associations, including integrated State Bars, have not been appointed by Congress to act with any governing authority in the United States Judiciary. The United States Supreme Court has determined that even integrated State Bars, wherein membership is a requirement for practicing law pursuant to State law, do not have standing as governmental agencies in the United States Judiciary. (*Keller v. State Bar of California et al.*, 496 U.S. 1, 2 (1990), "In contrast, there is substantial analogy between the relationship of the Bar and its members and that of unions and their members.")

Additionally, if the bars had governing power not authorized by Congress how could a system of checks and balances be applied to activity which would be impeachable. Congress cannot impeach, for example, a bar president who has acted unethically or committed a crime.

No rule of Court should delegate the Judiciary's power to any individuals or associations which have not been appointed by Congress. Safe harbor, in the context of the rules of court wherein litigants are instructed to keep allegations of perjurious and other inflammatory filings from the purview of the court so as to conserve on costs of litigation, is unconstitutional. It is incumbent on the court to direct itself to respect the jurisdiction of governing bodies consistent with the provisions of the Constitution and not with the interests of the legal profession.

IV. The Court should condemn, as unconstitutional, the practice of publication of privileged information by an attorney or a law firm to protect the attorney or the law firm from accusations of wrongful conduct, without the expressed authority of the Court.

Congress has no "rule-making" authority in the bars, nor does the executive branch have the authority to challenge the bar's disciplinary rules as dangerous to the public interest. Bars are privately financed from the dues of their members, are housed on private property, and, just like a condominium, can formulate any rules they choose to enhance the lives of the people live "there."

For example, Disciplinary Rule 4-101(C) of the *American Bar Association Model Code Of Professional Responsibility (2003)* asserts that: "A lawyer may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct." Following is Disciplinary Rule 4-101 (D) which states in pertinent part "that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."

It is highly unlikely that a client or potential client of a lawyer or law firm is aware of the fact that, pursuant to the ABA's governing authority, the code of confidentiality does not apply if the client decides to sue the attorney for malpractice. The internal disciplinary rule is even applicable if the attorney perceives that alleged fees are due and the client refuses to pay. It does not serve the public interest to have the means for extortion so readily available to a profession which has as its legacy a plethora of lawyer jokes promulgated by late night T.V. hosts. Such insidious practice violates the clients' Fifth Amendment right to protection from self incrimination.

The underlying legal malpractice lawsuit filed in the District Court had to do with the fact that Smania had inadvertently become involved in a fraud on the IRS leaving her personally vulnerable to claims or charges by that agency. If, as a result of the defendant lawyer's conduct. Smania had disclosed something in her letters which would have incriminated her as consciously participating in the alleged fraud, and that fact was published by an attorney who simply wanted revenge, wouldn't the Petitioner's right to not incriminate herself have been violated? Of course, it would have. Instead, in response to Smania's argument, in part, that the offending document was written by a Defendant who did not take an oath, the Magistrate wrote, "Plaintiff is wrong" as though the Pro Se Petitioner had no right to even cross examine or impeach the attorney defendant who had published her letters. (App. H)

It is a curious relationship that has developed between the Court and members of the bar. The visible link appears to be that an oath is taken to uphold the Constitution, which oath is shared

with the other two branches of government.

In *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)), the Court reasserted its province of judicial review over acts of Congress. "Congress is a co-equal branch of government whose members take the same oath we do to uphold the Constitution."

However, it's not just Congress that is subject to judicial review. In reviewing the activity of the office of the attorney general, the United States Supreme Court asserted that, "[The] Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the constitution and who have the responsibility for carrying on government." (*Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 164 (1951))

The oath appears to be the super glue of bonding between the legal profession, the Court, and its power. In order to qualify for admission to the Bar of the United States Supreme Court

> Each applicant shall sign the following oath or affirmation: I,……, do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States." (Supreme Court Rule 6)

Didn't all the members of the bar already take that oath?

This Court should prohibit the publication of privileged communication without the expressed authority of the Court. It should be incumbent on the Court to consider the relevancy of the privileged information to the issue at hand, weigh the client's 5th

Amendment rights against the public interest, and give meaning to the oath that members of the bar take to uphold the Constitution.

Conclusion

The Court should grant the Petition For Writ of Certiorari.

Respectfully Submitted,

Mary Ann Smania

Mary Ann Smania,
Petitioner *Pro Se*

(2)

Supreme Court, U.S.
FILED

04-799 DEC 6 - 2004

OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

Mary Ann Smania
Petitioner

v.

Sherwin Abrams, *Attorney*
Abrams and Chapman, *Law Firm*
Lawrence Benjamin, *Attorney*
Lawrence Richman, *Attorney*
Neal, Gerber and Eisenberg, *Law Firm*
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Mary Ann Smania
Petitioner, Pro Se
15815 Acorn Circle
Tavares, Florida 32778
(352) 343-8517

INDEX TO APPENDIX

DOCUMENT DESCRIPTION	LOWER COURT DOCKET #	APPENDIX . PAGES
11th Circuit Order on Smania's Motion for Rehearing, etc.		APP A-1 -2
11th Circuit Opinion on appeal		APP B- 1 -7
District Court's Order on Smania's Motion for Reconsideration	65	APP C-1 -2
District Court's Order on defendants' Motions to Dismiss	62	APP D-1 -14
District Court's Order on Smania's Motion for Certification of Interlocutory Appeal	61	APP E-1 - 14
District Court's Order on *de novo* review of prior orders	59	APP-F-1 - 3
District Court's Order to Show Cause	63	APP G-1 -2
Magistrate's Order on Plaintiff's Motions	48	APP H-1 -10

INDEX TO APPENDIX
continued

DOCUMENT DESCRIPTION	LOWER COURT DOCKET #	APPENDIX . PAGES
District Court's *sua sponte* Order on Defendant's Motion for Extension of Time	37	APP I-1 - 2
Magistrate's Order re: recusal	23	APP J-1 -7

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13403-CC

MARY ANN SMANIA,

Plaintiff-Appellant,

versus

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 08 2004
THOMAS K. KAHN
CLERK

SHERWIN ABRAMS, Attorney,
ABRAMS AND CHAPMAN, Law Firm,
LAWRENCE BENJAMIN, Attorney,
LAWRENCE RICHMAN, Attorney,
NEAL, GERBER AND FISENBERO,
Law Firm,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19 ,
____F.2d____

Before: EDMONDSON, Chief Judge, CARNES and HULL, Circuit Judges.

PER CURIAM:

ORD-42
(12/01)

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. EDMONSON
Chief Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13403
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 042004
THOMAS K. KAHN
CLERK

D. C. Docket No. 03-00104-CV-ORL-31-JGG

MARY ANN SMANIA,

Plaintiff-Appellant,

versus

SHERWIN ABRAMS, Attorney,
ABRAMS AND CHAPMAN, Law Firm,
LAWRENCE BENJAMIN, Attorney,
LAWRENCE RICHMAN, Attorney,
NEAL, GERBER AND EISENBERG,
Law Firm,

Defendants-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

(February 4, 2004)

Before EDMONDSON, Chief Judge, CARNES and HULL, Circuit Judges.

PER CURIAM:

Mary Ann Smania, proceeding pro se, appeals the district court's dismissal of her legal malpractice action against three Illinois lawyers and the two law firms at which they practice. No reversible error has been shown; we affirm.

Smania, a Florida resident, initiated this diversity legal malpractice action against Sherwin Abrams, Abrams & Chapman (the law firm at which Abrams practices), Lawrence Benjamin, Lawrence Richman and Neal, Gerber & Eisenberg (the law firm at which Benjamin and Richman practice). Smania was a beneficiary of the estate of her father, Paul Smania. On Paul Smania's death in 1998, the executor of Paul Smania's Will began probate proceedings in Florida but two days later moved the proceedings to Illinois. Defendant Abrams acted as legal counsel to the estate after probate proceedings were moved to Illinois. Although Paul Smania declared himself to be a resident of Florida in 1990, it appears that his Will was signed and recorded in Illinois.

Smania took issue with acts done by the executor and amounts paid by the estate to Abrams. Smania also took issue with the legal services rendered by Benjamin and Richman, who

had been engaged to defend the Paul Smania charitable remainder unitrust ("CRUT") in certain litigation the genesis of which Smania tied to acts of Abrams and the executor. Eventually Smania became convinced that Abrams had rendered poor advice and was conflicted in his representation of the estate; Smania also came to believe that Benjamin and Richman were complicit with Abrams. Smania named the three lawyers and the two law firms in her legal malpractice complaint.

Abrams received personal service of process and also accepted service on behalf of Abrams & Chapman.[1] Neal, Gerber & Eisenberg waived personal service pursuant to Fed.R.Civ.P. 4(d), though Benjamin and Richman did not. The process server left process for Richman and Benjamin with a secretary at Neal, Gerber & Eisenberg. All defendants moved to dismiss arguing, among other things, that the district court lacked personal jurisdiction. Defendants Benjamin and Richman also moved to dismiss based on insufficient service of process.

The district court found and concluded that no proper service of process on Benjamin and Richman had occurred; it ordered dismissal of the action against those defendants on that basis. The district court also concluded that (i) no personal jurisdiction over the lawyers or their law firms

---

[1] The record also contains a copy of a waiver of service signed by Abrams and "Abrams and Chapman."

existed under the Florida long-arm statute, Fla. Stat. § 48.193(1)(a) & (b), and (ii) the exercise of personal jurisdiction over the defendants would not comport with due process.

About the dismissal of Benjamin and Richman based on insufficient service, Smania complains that the district court erred by failing to compel them to waive formal service of process. Smania cites -- correctly -- the duty imposed by the Federal Rules of Civil Procedure on defendants to "avoid unnecessary costs of serving the summons." Fed.R.Civ.P. 4(d)(2). To avoid service costs, the plaintiff is permitted to request the waiver of formal service. Id. If the defendant fails to effect a timely waiver of service, "the court shall impose the costs subsequently incurred in effecting service upon the defendant." Id. The rules contemplate formal service upon a defendant who fails to waive service, albeit at the defendant's expense. See Fed.R.Civ.P. 4(d) and (e). Fed.R.Civ.P. 4(e) addresses specifically the acceptable methods for effecting service upon persons "from whom a waiver has not been obtained." Cf. African Methodist Episcopal Church. Inc. v. Ward, 185 F.3d 1201, 1202 (11th Cir. 1999) (stating in dicta that plaintiff "had to" effect formal service when no waiver of process was received). The rules impose liability for the costs of service on a defendant who necessitates formal service by failing to waive service; no provision is made for compelling waiver.

We see no error in the district court's

conclusion that it lacked personal jurisdiction over the defendants. See Mandara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990) (dismissal for lack of personal jurisdiction subject to de novo review). The district court reviewed carefully the Florida long-arm statute, Fla. Stat. § 48..193(1)(a) & (b), and concluded no personal jurisdiction had been established over these defendants. To fall within the conducting business element of the Florida long-arm statute, "[t]he activities of the person sought to be served ...must be considered collectively and show a general course of business activity in the State for pecuniary benefit." Diusmore v. Martin Blumenthal Associates. Inc., 314 So.2d 561, 564 (Fla. 1975) (interpreting predecessor Fla. Stat. § 48.193(1)(a)). Thc defendants were not licensed to practice law in Florida and had no offices, mailing address, or other indicia of doing business in Florida.

Smania does not appear to argue personal jurisdiction under the doing business element; instead, Smania argues that the district court concluded wrongly that the tortious act element, Fla. Stat. § 48.193(1)(b) failed to confer personal jurisdiction. The tortious act element requires no physical presence within Florida: "telephonic, electronic, or written communications into Florida may form the basis for personal jurisdiction under section 48.193(1)(b) if the alleged cause of action arises from the communications." Wendt v. Horowitz, 822 So.2d 1252, 1260 (Fla. 2002). If Smania's complaint alleged sufficient facts to state a valid cause of action, personal jurisdiction may

be predicated on the tortious act element if the cause of action arose from communications into Florida.

Smania's complaint alleged that Abrams was conflicted in his representation and charged her father's estate exorbitant fees. Smania also complained about acts Abrams took in transferring certain property in Illinois to a charitable remainder unitrust. Smania claimed that' this transfer resulted in a tax deduction to the estate that she characterizcd as "questionable," and that left her, as beneficiary of the estate, "in harms way" with the IRS. But the complaint does not allege -- and Abrams denies -- that he represented Smania personally.

Under Florida law, a legal malpractice complainant must plead and prove, among other things, the lawyer's employment. See Steele v. Kehoe, 747 So.2d 931, 933 (Fla. 1999). As a general rule, attorney liability for professional negligence extends only to clients with whom they share privity of contract. Angel, Cohen & Rogovin v. Oberon Invest.. N.V., 512 So.2d 192, 194 (Fla. 1987). Some limited exception to the privity requirement is recognized to third-party beneficiaries of testamentary documents to bring a malpractice action against the testator's attorney if the testamentary documents make clear that the third-party was the intended beneficiary of the attorney-client relationship. See Espinosa v. Sparber. Shevin et al., 612 So.2d 1378, 1380 (Fla. 1993) ("a limited exception to the strict privity

commission of a tortious act in Florida by Benjamin, Richman, their law firm or employees of their law firm. The acts about which Smania complains are tied to no communications into Florida; instead, the crux of Smania 's complaint against Neal, Gerber & Eisenberg is that they failed to take legal action against Abrams in Illinois and committed other acts in Illinois to which she objects.

In sum, we see no error in the district court's conclusion that Smania failed to establish personal jurisdiction over defendants in Florida.[2]

After consideration of all of Smania's allegations of error, we conclude that no reversible error has been shown.

AFFIRMED.

---

[2] Because the Florida long-arm statute conferred no personal jurisdiction over any of the defendants, we need not determine whether the exercise of personal jurisdiction would have satisfied the Due Process Clause. See Mandara, 916 F.2d at 1514 (due process analysis undertaken when basis for assertion of personal jurisdiction under the long-arm statute satisfied).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-3IJGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICUMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause comes before the Court on Plaintiffs Motion for Reconsideration (Doc. 63) pursuant to Federal Rule of Civil Procedure 60(b)(6) and Defendants' Response (Doc. 64). In her motion, Plaintiff seeks reconsideration of this Court's Order (Doc. 62) which dismissed her case for insufficiency of service of process, lack of personal jurisdiction over the Defendants, and alternatively for improper venue. The Court has carefully considered the motion, the accompanying memoranda, and is otherwise fully advised in the premises.

In support of her motion, Plaintiff asserts that this Court overlooked several facts which justify this Court changing or vacating its Order dismissing her case. The Court has considered the purported factual errors upon which Plaintiff relies and finds that even after considering those facts, this does not change the

conclusion of the Court that dismissal was proper for insufficient service of process, lack of personal jurisdiction over the Defendants, as well as improper venue.[1]

Accordingly, it is therefore

ORDERED AND ADJUDGED that Plaintiffs Motion (Doc. 63) is DENIED. The Clerk is directed to close this case.

DONE and ORDERED in Chambers, Orlando, Florida this day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

---

[1] Plaintiff's legal claims are not foreclosed by this Order. If Plaintiff still wishes to pursue this action, Plaintiff must effect proper service of process on the Defendants, and file her suit in a court in which venue is proper and where the court can exercise personal jurisdiction over them.

FILED
03 JUN - 5 PM 1:31
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-3IJGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERT,
Defendants.
_____/

ORDER

This cause comes before the Court on Defendants, Abrams' and the law firm of Abrams and Chapman's, Motion to Dismiss (Doc. 26, filed Mar. 31, 2003), Plaintiffs Response, titled Motion for More Definite Statement (Doc. 44, filed Apr. 11, 2003), Defendants, Richman's, Benjamin's, and the law firm of Neal, Gerber, and Eisenberg's Motion to Dismiss (Doc. 27, filed Apr. 1, 2003), Plaintiffs Renewed Motion to Recover Costs (Doc. 43, filed Apr. 11, 2003), which included argument in opposition to Richman's, Benjamin's, and the law firm of

Neal, Gerber, and

Eisenberg's Motion to Dismiss, and Benjamin's Declaration (Doc. 29, filed Apr. 1, 2003).[1] The Court has carefully considered the parties' motions and responses, including the attachments and supporting affidavits, exhibits, and declarations, the complaint, the argument of the parties, the
applicable law, and is otherwise fully advised in the premises.

I. INTRODUCTION AND BACKGROUND FACTS

Plaintiff, Mary Ann Smania, filed suit against Defendants, Sherwin Abrams, Abrams and Chapman, Lawrence Benjamin, Lawrence Richman, and Neal, Gerber, and Eisenberg, for legal malpractice arising from their representation of Smania's deceased father's estate, the various executors of the estate, and the trustees of the Paul Smania Trust and the various trustees of the estate. In their motion, Defendants, Abrams and the law firm of Abrams and Chapman, seek dismissal for improper venue, lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim. Similarly, Defendants, Benjamin, Richman, and the law firm of Neal, Gerber and Eisenberg, aver that the complaint should be dismissed for lack of personal jurisdiction and insufficiency of service of process. They also assert that this case should be transferred to the Northern District of Illinois and alternatively seek to compel arbitration.

---

[1] Both this Court and the Magistrate Judge elected to treat Plaintiffs Motions (Does. 43 & 44) as Responses in opposition to the Defendants' Motions to Dismiss. (See Orders, Docs. 48 & 59).

I. MOTION TO DISMISS FOR INSUFFICIENCY OF PROCESS

In their motion, Benjamin and Richman argue that service of process was improper under Florida law,[2] Illinois law,[3] or Rule 4(e)(2) because the returns of service showed that service on Richman and Benjamin was made by serving a secretary of the law firm of Neal Gerber, and Eisenberg. Rule 4 provides:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of

---

[2] Fla. Stat. § 48.031.

[3] Ill. Code. Ch. 735, § 5/2-203.

process.

Likewise, under both Illinois law and Florida law personal service or service by leaving a copy of the summons and complaint at the individual's dwelling house or usual place of abode is required. Fla. Stat. 48.031; Ill. Code. Ch. 735, 5/2-203.[4]

---

[4] Because the Defendants are residents of Illinois, the Illinois Code is applicable. Section 5/2-203 of the Illinois Code provides in relevant part:

> (a) Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. . .

However, even if this Court applied Florida law instead of Illinois law, the result would be the same. Section 48.031, Florida Statutes states in pertinent part:

> (l)(a) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15

Here, the return of service indicates that service was made on Benjamin and Richman by serving a copy of the summons and complaint on a secretary at the law office of Neal, Gerber, and Eisenberg. Therefore service was insufficient under any of the applicable laws and dismissal without prejudice is proper.

II. MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

A. Legal Standards

A plaintiff has the burden in alleging personal jurisdiction to plead sufficient material facts to establish the basis for exercise of such jurisdiction. **Future Technology Today. Inc. v. OSF Healthcare Sys.**, 218 F.3d 1247, 1249 (11th Cir. 2000) (citing Prentice v. Prentice Colour. Inc.,779 F. Supp. 578, 583 (M.D. Fla. 1991)).

> First, the plaintiff must allege sufficient facts in his complaint to initially support long arm jurisdiction before the burden shifts to the defendant to make a prima

---

> years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.
> (b) Employers, when contacted by an individual authorized to make service of process, shall permit the authorized individual to make service on employees in a private area designated by the employer.

> facie showing of the inapplicability of the statute. If the defendant sustains this burden, the plaintiff is required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations in the complaint.

Id. (citing Prentice, 779 F. Supp. at 583 (citations omitted)). Once the plaintiff pleads sufficient material facts to support the exercise of in personam jurisdiction, the burden shifts to the defendant to challenge the plaintiffs allegations by affidavits or other competent evidence. Prentice, 779 F.Supp. at 585-86. If the defendant sustains this burden, the plaintiff is required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations contained in the complaint. Id. at 586.

The uncontroverted evidence regarding the parties' residences is as follows. Smania is a resident of the State of Florida. Smania's father's estate was administrated and admitted to probate in Illinois pursuant to a will apparently signed and recorded in Illinois, despite Paul Smania's declaration of domicile in Florida filed in 1990. Further, the trustees of the Paul Smania Trust and executors of the probate estate were all Illinois residents. Additionally, the three attorney Defendants, Abrams, Richman, and Benjamin, are residents of Illinois. The law firm of Abrams and Chapman is a general partnership, and its only offices are in Chicago, Illinois. The law firm of Neal, Gerber, and Eisenberg, operates from its offices in Chicago, Illinois. Defendants are not licensed to do business in Florida, are not members of The Florida Bar, and do not maintain an

office in Florida.

B. Analysis

In deciding the issue of personal jurisdiction in a diversity case, a court must conduct a two-part inquiry. Future Technology, 218 F.3d at 1249 (citing Sculptchair. Inc. v. Century Arts, Ltd., 94 F.3d 623 (11th Cir. 1996)); Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 919 (11th Cir. 1989); see also Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (holding that where federal jurisdiction is based on diversity of citizenship, federal courts cannot entertain a claim if the courts of the forum state could not entertain the same claim). First, the court must determine whether the applicable state statute governing personal jurisdiction is satisfied, in this case, section 48.193, Florida Statutes. Id (citing Sculptchair, 94 F.:3d at 626). If the requirements of the long-arm statute are satisfied, then the court must inquire as to (1) whether defendant has established sufficient "minimum contacts" with the state of Florida; and (2) whether the exercise of this jurisdiction over defendant would offend "traditional notions of fair play and substantial justice" under International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), and its progeny.[5]

---

[5] There are two types of personal jurisdiction: general and specific. Helicopteros Nacionales de Colombia, SA. v. Hall, 466 U.S. 408, 414-15 n.8 & n.9 (1984). General jurisdiction arises as a result of a party's substantial or "continuous and systematic" contacts with the forum state that are unrelated to the litigation. Perkins v. Benguet Consol. Mm. Co., 342 U.S. 437, 438 (1952); Williams Elec. Co. v. Honeywell, Inc., 854 F.2d 389, 392 n.2 (11th Cir. 1988) (citing Sea Lift, Inc. v. Refinadora Costarricense de Petrolco, SA., 792 F.2d 989, 992(11th Cir. 1986)). While

Future Technology, 218 F.3d at 1249 (citing Sculptchair, 94 F.3d at 630-31) (quoting International Shoe, 326 U.S. 310); Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990). Only if both prongs of the overall jurisdictional test are satisfied, in this case Florida's long-arm statute and the due process analysis, may the court exercise personal jurisdiction over nonresident defendants. Madara, 916 F.2d at 1514.

1. Florida's Long-arm Statute

Although Smania has made no allegations concerning personal jurisdiction, it appears that she is asserting that the requirements of the Florida long-arm statute are met by virtue of Defendants conducting business within the State and committing the tort of legal malpractice in Florida.[6] See Fla. Stat. § 48.193(1)(a) & (b). Sections 48.193(1)(a) & (b) of the Florida long-arm statute state in pertinent part:

---

there exists no clear methodology for analyzing general jurisdictional problems "[w]hat is certain is that although minimum contacts suffice in and of themselves for specific jurisdiction, the standard for general jurisdiction is considerably more stringent." Prentice, 779 F. Supp. at 583-84 (citing Glater v. Eli Lilly & Co., 744 F.2d 213 (1st Cir. 1984)). Specific jurisdiction, on the other hand, is exercised when the suit arises out of or is related to a party's single or isolated contacts with the forum. Helicopteros, 466 U.S. at 414. Jurisdiction under a state's long-arm statute is the practical equivalent of specific jurisdiction.

[6] Although the Court has already determined that service of process was insufficient as to Richrnan and Benjamin, the Court will nevertheless analyze whether it has personal jurisdiction overall of the Defendants.

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
> (b) Committing a tortious act within this state.

Fla. Stat. § 48.193(1)(a) & (b). The reach of the Florida long-arm statute is a question of Florida law, thus, the court must construe it as would the Florida Supreme Court. Madara, 916 F.2d at 1514. Florida's long-arm statute "is strictly construed, and the person invoking jurisdiction under
it has the burden of proving facts which clearly justify the use of this method of service of process." Oriental Imports & Exports. Inc. v. Maduro & Curiel's Bank. N.V., 701 F.2d 889, 891 (11th Cir. 1 983) (citations omitted).

The undisputed evidence shows that none of the Defendants are licensed to do business in Florida. Nor do they have any offices, employees, officers, property, telephone numbers, or mailing addresses in Florida. Accordingly, personal jurisdiction is not available under section 48.193 (1)(a).

The Defendants also assert that they have not committed a tortious act in Florida. On the other hand, Smania appears to argue that Defendants committed legal malpractice in Florida because correspondence was sent back and forth to Smania in Florida and the probate estate was originally opened in Florida. To fall within the "tortious act" aspect of Florida's long-arm statute, a defendant must have committed a "'substantial aspect of the alleged tort in Florida' by establishing that the activities in Florida 'w[ere] essential to the success of the tort.'" Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 857 (11th Cir. 1990) (citing Williams Elec. Co., Inc. v. Honeywell, Inc., 854 F.2d 389, 394 (11th Cir. 1988) (quoting Watts v. Haun, 393 So.2d 54, 56 (Fla. 1st DCA 1981))). Importantly, the statute requires that the defendant "personally" perform the acts or omissions giving rise to personal jurisdiction. Doe v. Thompson, 620 So.2d 1004, 1005-06 (Fla. 1993) (citing American Heritage Dictionary 926 (2d col. ed. 1985) ("'Personally' means: 'In person; without the intervention of another.'"); see Fla. Stat. 48.193.

Here, the affidavits and exhibits submitted by the Defendants indicate that Smania was not a client of the Defendants, she only agreed to guarantee payment for the legal representation of one of the executors of the estate, not to any legal representation of herself, and she paid for that legal representation after receiving copies of invoices. Indeed, at least one letter indicates that Smania had her own attorney and she would be filing papers against the trustee and the executor in various venues. Even under a generous and liberal reading of the complaint, it cannot be said that the Defendants created any substantial aspect of the alleged tort of legal malpractice in Florida.

2. Due Process

Although the Court has determined that the requirements of the Florida long-arm statute are not satisfied, the Court will still consider whether the exercise of personal jurisdiction over the Defendants comports with due process under federal constitutional law. "The first prong of this second, constitutional, phase of the Court's jurisdictional analysis asks the Court to consider whether the defendant has purposefully established certain minimum contacts with the forum state out of which the instant action arises." Hoechst Celanese Corp. v. Nylon Eng'g Resins, Inc ., 896 F. Supp. 1190, 1193 (M.D. Fla. 1995) (citing Asahi Metal Indus. Co. v. Superior Ct. of Calif., Solano County, 480 U.S. 102, 108-09 (1987)). The second prong requests the Court to determine whether the assertion of such jurisdiction offends "traditional notions of fair play and substantial justice." Madara, 916 F.2d at 1515-16 (quoting International Shoe, 326 U.S. at 316).

The key to any constitutional inquiry into personal jurisdiction is foresecability. Sun Bank, N.A. v. E.F. Hutton & Co., Inc., 926 F.2d 1030, 1034(11th Cir. 1991) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)). To be subject to the jurisdiction of a foreign state, a defendant must purposefully establish sufficient minimum contacts with that state so "that he should reasonably anticipate being haled into court there." Id. (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Burger King, 471 U.S. at 474). The nature of the activities that can constitute such minimum contacts frequently has been explained in the language of Hanson v. Denckla, 357 U.S. 235, 253 (1958): "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of

conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id Asahi, 480 U.S. at 112 ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposely directed toward the forum State") (citations omitted). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts. . . ." Burger King 471 U.S. at 475 (quoting Keeton v. Hustler Magazine, 465 U.S. 770, 774 (1984); World-Wide Volkswagen, 444 U.S. at 299).

According to the Defendants, no business, other than a personal meeting and the exchange of letters discussing the representation of one of the executors to the Smania estate and the guarantee of payment for this representation, occurred between Smania and the Defendants. All legal representation of the executors, the estate, and the trustees of the Smania trust occurred in Illinois, including the administration of the probate estate and a suit involving the Smania trust. There is absolutely no evidence to suggest that Defendants made any deliberate and purposeful contacts in Florida by which they could be expected to be haled into court. Furthermore, the Defendants did not conduct any business in or direct its activities at the residents of Florida. Therefore, the Court finds that the Defendants lack sufficient minimum contacts with Florida to support this Court's exercise of personal jurisdiction.

Nevertheless, the Court will go on to consider whether considerations of fair play and substantial justice counsel permitting the exercise of personal jurisdiction over the Defendants even though their contacts with Florida

ordinarily would not permit it. Sun Bank, 926 F.2d at 1034-35 (citing Burger King, 471 U.S. at 477). Relevant factors to this analysis include:

> the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiffs interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies.

Burger King, 471 U.S. at 477 (internal quotation marks omitted); Asahi, 480 U.S. at 113; Madara, 916 F.2d at 1517.

These factors do not mandate a different result. Illinois, not Florida, has an obvious special interest in adjudicating this suit involving the alleged malpractice by Illinois lawyers arising from the legal representation of a probate estate and the administration of a trust in Illinois. Moreover, as to the last two factors, there is nothing unusual or special about this case which would justify lessening the ordinary minimum contacts threshold to ensure fundamental fairness. Therefore, this Court finds that it does not have personal jurisdiction over the Defendants and dismissal would be appropriate.[7]

---

[7] Because this Court does not have personal jurisdiction over the Defendants, it is unnecessary to address the other arguments raised in the Defendants' motions. However, it appears that venue is improper in the Middle District of Florida and that the only proper place to bring this

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants' Motions to Dismiss (Docs. 26 & 27) are **GRANTED.**

DONE and **ORDERED** in Chambers, Orlando, Florida this 5th day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

---

suit would be the Northern District of Illinois. See 28 U.S.C. § 1391(b).

FILED
03 JUN - 5 AM 8:43
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-I 04-Orl-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause comes before the Court on Plaintiff's pro se Motion for Certification of an Interlocutory Appeal (Doc. 54), Plaintiff's pro se Notice of Intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52), which this Court elected to treat as objections to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying

Plaintiffs various motions, and Defendants' Response (Doc. 58) to Plaintiff's Motion. The Court has conducted a *de novo* review of the Orders and in doing so has carefully read and considered the complete record including all of the papers, pleadings, motions, responses, affidavits, and exhibits, the argument of the parties, and the applicable law.

I. INTRODUCTION

Plaintiff, Mary Ann Smania, filed suit against Defendants, Sherwin Abrams, Abrams and Chapman, Lawrence Benjamin, Lawrence Riehman, and Neal, Gerber and Eisenberg, for legal malpractice arising from their representation of Smania's deceased father's estate, the various executors of the estate, and the trustees of the Paul Smania Trust. During the course of this litigation, various motions have been filed by parties. Pursuant to Federal Rule of Civil Procedure 72(a) and 28 U.S.C. §636(b)(1)(A), these motions were referred to the Magistrate Judge, randomly assigned to this case, by this Court for issuance of a decision.[1] As a result, several decisions were rendered by the Magistrate Judge, to which Smania objects. The issues addressed in Smania's objections and those decisions will be addressed in turn.

II. BACKGROUND FACTS

---

[1] It should be noted that neither Plaintiff nor the Defendants in this case have consented under Federal Rule of Civil Procedure 73 to a trial of all issues by the Magistrate Judge. No consent by the parties is required for matters referred to a magistrate judge under §636(b)(1)(A) and Rule 72.

On January 27, 2003, Smania filed her Complaint (Doc. 1) with the Clerk. That same day, the Clerk issued summonses for Defendants Abrams, the law firm of Abrams and Chapman, Benjamin, Richman, and the law firm of Neal, Gerber, and Eisenberg, and gave them to Smania for service. At that same time, Smania also requested waiver of service forms. (Pl. Aff. at 1, ¶ 3). On January 29, 2003, Smania sent waivers of service to each of these Defendants via certified mail. (Id. at 2, ¶ 5).

On February 24, 2003, Smania received a waiver of service from the law finn of Neal, Gerber, and Eisenberg, which she filed with the Court on February 27, 2003 (Doc. 8). (Id. at 2, ¶ 8). Despite receiving a return receipt from each of the waivers of service sent, Smania received no other waivers of service.[2] Smania then sought to have summonses served on Abrams, the law firm of Abrams and Chapman, Benjamin, and Richman. On March 5, 2003, Smania filed returns of service for Abrams, the law firm of Abrams and Chapman, Benjamin, and Richman. (Docs. 9-12). According to the returns of service, Abrams and the law firm of Abrams and Chapman were served on March 4, 2003, and Benjamin and Richman were served on March 3, 2003. Thus, answers to the complaint were purportedly due on March 23rd for Richman and Benjamin, and March 24th for Abrams and the law firm of Abrams and Chapman.

On March 26, 2003, Benjamin and Richrnan filed a

---

[2] On March 19, 2003, Smania did receive a copy of a waiver of service from Abrams and the law firm of Abrams and Chapman (see Doc. 15 at attach.), which was dated January27, 2003.

motion with memorandum (Doc. 17) to extend time to Monday, April 31, 2003 (sic) to respond to the complaint. On March 27, 2003, Smania filed motions for default against Abrams, the law firm of Abrams and Chapman, Benjamin, and Richman. (Docs. 18-22). In their motion, Benjamin and Richman argued thatservice of process was improper under Florida law,[3] Illinois law,[4] or Rule 4(e)(2) because the returns of service showed that service on Richman and Benjamin was made by serving a secretary of the law firm of Neal, Gerber, and Eisenberg. On March 31, 2003, Smania filed a Response (Doc. 25) stating that she opposed the extension of time and arguing that because they were
attorneys, Richman and Benjamin had a duty and obligation to sign and return the waiver of service to save the costs of service. In her Response (Doc. 25), Smania also sought costs for service; but, she did not state an amount of such costs.

On April 1,2003, the Magistrate granted by endorsed order Riebman's and Benjamin's motion (Doc. 31) to respond to the complaint on April 31, 2003. On April 4, 2003, upon a *sua sponte* review of the file, this Court vacated that Order (Doc. 31) because April does not have 31days. (Doc. 37). The Court then granted the motion and allowed Richman and Benjamin until May 1,2003 to respond. (Id..).

Also, on March 31, 2003, Abrams and the law firm of Abrams and Chapman filed a motion to dismiss (Doc. 26). On April 1, 2003, Richman, Benjamin. and the law firm of Neal, Gerber, and Eisenberg filed their Motion to Dismiss

---

[3] Fla. Stat. §48.031.

[4] Ill. Code. Ch. 735, § 5/2-203.

(Doc. 27). That same day, Benjamin filed a Declaration (Doc. 29) in support of the Motion to Dismiss. On April 11, 2003, Smania filed a Renewed Motion to Recover Costs (Doc. 43), which included argument in opposition to Richman's, Benjamin's, and the law firm of Neal, Gerber, and Eisenberg's Motion to Dismiss; a Response, titled Motion for More Definite Statement (Doc. 44), to Abrams' and the law firm of Abrams and Chapman's Motion to Dismiss; and a Motion to Strike (Doc. 45) Benjamin's Declaration. On April 14, 2003, Benjamin and Richman filed a Memorandum in opposition to the Motion for Default (Docs. 20 & 21). On April 17, 2003, Benjamin and Richman filed a Memorandum in opposition to the Motion to Recover Costs for Service (Doc. 47).

On April 24, 2003, the Magistrate Judge entered an Order (Doc. 48) denying Smania's Motions for Default (Docs. 18-21), the Motion for Costs of Service (Docs. 25 & 43) without prejudice, and the Motion for More Definite Statement (Doc. 44). On April 28, 2003, Benjamin and Richman filed a Memorandum (Doc. 49) in opposition to Smania's Renewed Motion for Costs (Doc. 43) and a Memorandum (Doc. 50) in opposition to Smania's Motion to Strike Benjamin's Declaration (Doc. 29).

On May 7, 2003, Smania filed a Motion for Certification of an Interlocutory Appeal (Doc. 54). Then, on May 15, 2003, she filed a Notice of Intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52). This Court elected to treat both papers as objections to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying Plaintiffs various motions. (See Order Doc. 59).

III. DISCUSSION

A. Treatment of Smania's Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a Motion for Recusal

Smania asserts in her various papers (Doc. 13 at ¶¶ 10-11) that she never filed a motion for recusal and was perplexed as to why the Magistrate Judge set a hearing on a motion that she had not formulated, before any of the defendants had appeared in the suit. As the Magistrate Judge explained to Smania in the hearing he held on March 25, 2003, he, as a matter of practice, sets hearings when it appears the parties are raising anything related to recusal to determine whether the parties are indeed seeking recusal or if recusal is required. The Court finds that there is nothing wrong with this practice and indeed it appears that it addresses any recusal issues at the earliest possible stage of the proceedings. Furthermore, the Court has read Smania's Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4, filed Feb. 3, 2003) and finds that on page two, paragraph 5, Smania states that "[she] believes that there is a basis for recusal of the Magistrate Judge James G. Glazebrook." Accordingly, there is no error in the Magistrate Judge treating Smania's Certificate (Doc. 4) as a motion for recusal.[5]

B. Order (Doc. 31) Granting of

---

[5] Although not before this Court, if asked to determine whether recusal was required under the facts alleged, this Court would conclude that recusal was not required.

Defendants, Benjamin's and Richman's, Motion for Extension of Time to Respond

Smania claims that the Magistrate Judge erred by granting Benjamin's and Richman's Motion (Doc. 17) for Extension of Time to Respond to the Complaint (Doc. 1). The record shows that although the Magistrate Judge nor this Court gave any reasons for granting the extension of time, it is clear that an extension was not improper because Richman and Benjamin had not been properly served by Smania. Rule 4 provides:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Furthermore, under both Illinois law and Florida law personal service or service by leaving a copy of the summons and complaint at the individual's dwelling house or usual place of abode is required. Fla. Stat. 48.031; III. Code. Ch. 735, § 5/2-203.[6]

C. Order (Doc. 48) Denying Motions (Docs. 18-22) for Default Judgment

Smania contends that Abrams, the law firm of Abrams and Chapman, Richman, and Benjamin have defaulted because they did not respond to her complaint by March 24, 2003. Rule 55 of the Federal Rules of Civil Procedure governs the procedure for obtaining a default judgment. Rule 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or

---

[6] Section 5/2-203 of the Illinois Code provides in relevant part:

> (a) Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. . .

otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). Thereafter, a party may seek a default judgment from either the district judge or the clerk of the court, depending upon whether the damages are for a "sum certain" or not. Fed. R. Civ. P. 55(b). Thus, entry of default by the clerk is a prerequisite to moving for a default judgment. Fed. R. Civ.P. 55(a); Local Rule 1.07(b).

Moreover, a motion for the court's entry of judgment by default is not granted as a matter of right, and in fact is judicially disfavored. Patray v. Northwest Pub., Inc., 931 F. Supp. 865, 868(S.D. Ga. 1996) (citing 10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure Civil 2d §§ 2681, 2685); see Wahl v. Mclver, 773 F.2d 1169, 1174 (11th Cir. 1985) (default judgment should only be used in extreme situations). That is why Rule 55(b)(2) vests the court with judicial discretion in determining whether the judgment should be entered. Patrav, 931 F. Supp. at 868 (citing Wright, et al, § 2685 at 421 (citing Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977))). For a default judgment to be entered, there must be a sufficient basis in the pleadings and the judgment cannot stand on a complaint that fails to state a claim. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1371 n.41 (11th Cir. 1997) (citations omitted).

As the Magistrate Judge correctly determined, Smania did not move for entry of default by the Clerk. Therefore, her Motions for Default Judgment (Docs 18-21) were properly denied. Furthermore, a party cannot be in default if he has not been properly served. Hence, default judgment could not have been entered against Richman and Benjamin. Finally, Richman and Benjamin were given until May 1, 2003 to respond and they flied a motion to dismiss on March31, 2003. Thus, they could not have been in default for failing to answer the complaint.

D. Order (Doc. 48) Denying Smania's Motions to Recover the Costs of Service (Docs. 25 & 43).

In her Motions, Smania asserted that she was entitled to recover the costs of service because the Defendants had a duty to sign the waiver of service. and save the costs of service. Rule 4(d) provides in relevant part:

> (2) An individual, corporation, or association that is subject to service under subdivision (e). (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons....

Fed. R. Civ. P. 4(d)(2). Furthermore,

> [i]f a defendant. . . fails to comply with a request for waiver made by a plaintiff. . . ,the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown. . . . (5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h) . .

Fed. R. Civ. P. 4(d)(2), (5)[7]

The Magistrate's Order indicates that he denied Smania's motion for costs without prejudice to refile at the close of the case because she failed to comply with Local Rule 3.0 1(g) and because she did not delineate the amount of costs she incurred in serving the Defendants. Local Rule 3.01(g) requires that

> Before filing any motion in a civil case, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action, the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion and shall file with the motion a statement (1) certifying that the moving counsel has conferred with opposing counsel and (2) stating whether counsel agree on the resolution of the motion...

---

[7] Although it is the duty of the law firm and arguably any attorney to waive service and thereby minimize a plaintiffs costs, this duty is not such that it creates a legal obligation to do so. Rather, should the defendant who has been asked to waive service unreasonably refuse, he or she must pay for the costs of service. In no case, does this obligation create a method for a plaintiff to obtain a default judgment if service is not waived.

Local Rule 3.01(g). A review of Smania's Motions to Recover the Costs of Service (Docs. 25 & 43) reveals that there is no statement indicating that she conferred with counsel for the Defendants.[8] Additionally, Smania did not state the amount she sought to recover in her Motion. Thus, denial was proper. Furthermore, the Magistrate Judge did not permanently foreclose Smania from recovering her fees. Rather, she must now wait until the conclusion of the case to seek recovery. Accordingly, there was no error.[9]

E. Order (Doc. 48) Denying Smania's Motion for a More Definite Statement (Doc. 44)

In her Motion (Doc. 44), Smania claimed that she needs more specificity pursuant to Rule 12(e) from Abrams in his affidavit filed in support of Abrams' and the law firm of Abrams and Chapman's Motion to Dismiss (Doc. 26). A motion for a more definite state is available to a party when a pleading is so vague or ambiguous that a responsive pleading cannot be framed. Fed. R.Civ. P. 12(e). Pleadings consist of a complaint and

---

[8] In her various papers and motions, Smania also complains that the Defendants did not comply with Local Rule 3.01(g) before filing their motions to dismiss. However, no certification is necessary for dispositive motions. Local Rule 3.01(g).

[9] The Magistrate Judge's Order also reflects that he correctly treated the balance of Smania's Motion as a memorandum in opposition to Richman's, Benjamin's, and the law firm of Neal, Gerber,and Eisenberg's Motion to Dismiss. This Court also did the same. See Order (Doc. 59).

answer, reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. Fed. R. Civ. P. 7(a). Under the Rules, a motion is not a pleading, nor is an affidavit. Fed. R. Civ. P. 2(b). Thus, the Magistrate Judge properly denied Smania's Motion for More Definite Statement.[10]

F. Order (Doc. 48) Denying Smania's Motion to Strike (Doc. 45) Benjamin's Declaration

In her Motion (Doc. 45), Smania asked the Court to strike Benjamin's Declaration (Doc. 29), which was filed in support of the Motion to Dismiss (Doc. 27), as being impertinent and scandalous and because it was not acknowledged by a notary. The Magistrate Judge declined to strike the Declaration (see Doc. 48), finding that it a notary acknowledgment was not necessary and that it was not impertinent or scandalous. After reading the Declaration and reviewing 28 U.S.C. § 1746, which governs unsworn declarations, the Court finds that Benjamin's Declaration is in full compliance with § 1746 and should be given full force and effect. Furthermore, there is nothing impertinent or scandalous contained in the Declaration. Thus, there was no error in the Magistrate Judge's ruling.

IV. CONCLUSION

---

[10] The Magistrate Judge treated the remainder of Smania's Motion as a memorandum in opposition to Abrams' and Abrams and Chapman's Motion to Dismiss, which this Court chose to also do. See Order (Doc. 59).

Based on the foregoing, it is therefore

ORDERED AND ADJUDGED that the Plaintiffs Motion for Certification of an Interlocutory Appeal (Doc. 54) and Plaintiffs pro se Notice of Intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52), which this Court elected to treat as objections to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Dcc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying Plaintiffs various motions are OVERRULED.

DONE and ORDERED in Chambers, Orlando, Florida this 4th day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 JUN - 5 PM 2:04
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-3IJGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause comes before the Court on Plaintiff's pro se Motion for Certification of an Interlocutory Appeal (Doc. 54), Plaintiff's pro se Notice of intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52), Plaintiff's Motion to Compel a Response (Doc. 57) to her Motion for Certification (Doc. 54), and Defendants' Response (Doc. 58). In her Motion and Notice, Plaintiff asks this Court to certify an interlocutory appeal to the Eleventh Circuit Court of Appeals on the Magistrate Judge's Endorsed Order (Doc.

31) and this Court's subsequent Order correcting a clerical error in that Endorsed Order (Doc. 37). However, a careful reading of Plaintiff's Motion and Notice reveals that Plaintiff is objecting to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying Plaintiffs various motions. Accordingly, pursuant to Rule 72 of the Federal Rules of Civil Procedure and Local Rule 6.02, this Court will treat Plaintiffs Motion and Notice as objections to the Magistrate's Orders and will make a *de novo* determination on the issues based upon the complete record.[1]

It is therefore

ORDERED AND ADJUDGED that

(1) Plaintiff's Motion for Certification of an interlocutory Appeal (Doc. 54) is **DENIED** only to the extent its seeks such certification. Otherwise, it and Plaintiff's Notice (Doc. 52) will be treated as objections to the orders of the Magistrate Judge (Docs. 31 & 43).

---

[1] It should be noted that neither Plaintiff nor the Defendants in this case have consented under Federal Rule of Civil Procedure 73 to a trial of all issues by the Magistrate Judge. Rather, the motions which were ruled upon by the Magistrate Judge were referred to him by this Court under Federal Rule of Civil Procedure 72(a), which provides for magistrate judges to hear pre-trial matters consistent with their limited jurisdiction under 28 U.S.C. § 636(b)(l)(A). No consent by the parties is required for matters referred to a magistrate judge under ° 636(b)(l)(A) and Rule 72.

(2) Plaintiff's Motion to Compel a Response (Doc. 57) is **DENIED** as moot.

(3) Further, Plaintiff and Defendants are advised that this Court, not the Magistrate Judge, will take under advisement the pending dispositive motions for dismissal (Docs. 26 & 27) filed by the Defendants and will render a written opinion on such after considering the complete record including Plaintiff's Motions (Docs. 43 & 44).

DONE and **ORDERED** in Chambers, Orlando, Florida this 3 day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 MAY 27 PM 2:48
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,
-vs- Case No. 6:03-cv-104-Orl-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERT,
Defendants.
_____/

Order To Show Cause

The Plaintiff is directed to show cause by a written response filed within eleven days why this case should not be dismissed pursuant to Local Rule 3.10 for lack of prosecution due to the non-filing of a Case Management Report within the time prescribed by Local Rule 3.05. Failure to respond may result in a dismissal of this action without further notice.

DONE and ORDERED in Chambers at Orlando, Florida, on this 27 day of May, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 APR 24 PM 3:13
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

- vs - Case No. 6:03-cv-104-OrI-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause came on for consideration without oral argument on the following motions:

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST ABRAMS AND CHAPMAN (Doc. No. 18)
FILED: March 27, 2003
REFERRED: April 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST SHERWIN ABRAMS (Doc. No. 19)
FILED: March 27,2003
REFERRED: AprIl 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST LAWRENCE BENJAMIN (Doc. No. 20)
FILED: March 27, 2003
REFERRED: April 11, 2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST LAWRENCE RICHMAN (Doc. No. 21)
FILED: March 27,2003
REFERRED: April 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION TO RECOVER COSTS FOR SERVICE (Doc. No. 25)
FILED: March 31, 2003
REFERRED: April 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION TO RECOVER COSTS OF SERVICE (Doc. No. 43)
FILED: April 11,2003
REFERRED: April 16,2003

THEREON it is ORDERED that the motion is DENIED to the extent is seeks to recover costs for service; otherwise, the motion, which argues against defendants' motion to dismiss (Doc. No. 27), is treated as a memorandum in opposition to defendants Neal, Gerber & Eisenberg, Lawrence Benjamin, and Lawrence Richman's motion to dismiss (Doc. No. 27).

MOTION: PLAINTIFF'S MOTION FOR MORE DEFINITE STATEMENT (Doc. No. 44)
FILED: April 11,2003
REFERRED: April 16,2003

THEREON it is ORDERED that the motion is DENIED to the extent it asks for a more definite statement relating to a motion to dismiss; otherwise, the motion, which argues against defendants' motion to dismiss (Doc. No. 26), is treated as a memorandum in opposition to defendants Abrams and Abrams and Chapman's motion to dismiss (Doc. No. 26).

I. THE LAW

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the civil rules, and that fact is made to appear by affidavit or otherwise, the Clerk enters the party's default. Fed. R. Civ. P. 55 (a) (emphasis added). The clerk's entry of default is the official recognition that the party is in default. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). The entry of default is a prerequisite for the entry of judgment upon that default. It is, in effect, similar to a finding of liability with the entry of final judgment yet to

come. *Alameda v. Secretary of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 n. 3 (1st Cir. 1980). Local Rule 1.07 (b) of the Middle District of Florida specifically states:

> When service of process has been effected but no appearance or response is made within the time and manner provided by Rule 12, Fed.R. Civ.P., the party effecting service shall promptly apply to the Clerk for entry of default pursuant to Rule 55(a), and shall then proceed without delay to apply for ajudgment pursuant to Rule 55 (b), failing which the case shall be subject to dismissal sixty (60) days after such service without notice and without prejudice....

Local Rule 1.07 (emphasis added) (citations omitted).

Rule 55 (b)(2) further provides:

> In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter

> judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

The mere entry of a default by the Clerk does not in itself warrant the entry of a default judgment by the Court. Rather, the Court must find that there is a sufficient basis in the pleadings for the judgment to be entered. *Nishimatsu Construction v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cu. 1975). A default judgment cannot stand on a complaint that fails to state a claim. *Chudasama v. Mazda Motor Corporation*, 123 F.3d 1353, 1370 n.41 (11th Cir. 1997), citing *Nishimatsu*, 515 F.2d at 1206. A default judgment has the effect of establishing as fact the plaintiff's well-pleaded allegations of fact, and bars the defendant from contesting those facts on appeal. *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987), citing *Nishimatsu*, 515 F.2d at 1206.

II. DISCUSSION

A. Plaintiff's Motions for Default Judgment (L)oc. Nos. 18, 19, 20, and 21)

Plaintiff contends that defendants Abrams, Abrams and Chapman, Benjamin, and Richman have defaulted because they did not respond to her complaint by March

24, 2003. According to Fed.R.Civ.P. 55 (a) and Local Rule 1.07 (b), a default must be entered prior to the entry of default judgment. Plaintiff failed to apply to the Clerk for entry of default prior to filing any of her motions for default judgment. Accordingly, plaintiffs motions for default judgment at Docket Nos. 18, 19, 20, and 21 are **DENIED**. Additionally, the Court notes that defendants Lawrence Benjamin and

Lawrence Richman have timely responded to the Complaint pursuant to this Court's orders granting defendants' motions for extensions of time. *See* Docket Nos. 3 land 37.

B. Plaintiff's Motions to Recover Costs for Service (Doc. Nos. 25 and 43).

In her motion at Docket No. 25, plaintiff seeks to recover costs incurred in serving defendants Benjamin and Richman pursuant to Fed.R.Civ.P. 4 (d)(2).[1] However, plaintiff failed to comply with Local Rule 3.01 (g).[2] Additionally, plaintiff submitted no proof of the

---

[1] Fed.R.Civ.P. 4 (d)(2) provides in pertinent part:

> ... if a defendant located within the Untied States fails to comply with a request for waiver made by a plaintiff located within the Untied States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause of the failure be shown.

[2] Local Rule 3.01(g) requires the following:

amount and description of costs she seeks. Accordingly, plaintiffs motion to recover costs (Doc. No. 25) is **DENIED** without prejudice to refile *at the conclusion of the case*.

Plaintiffs renewed motion to recover costs of service (Doc. No. 43) in actuality is plaintiff's memorandum in opposition to defendants Neal, Gerber & Eisenberg's, Lawrence Benjamin's, and Lawrence Richman's motion to dismiss. See Docket No. 43 at 1. Plaintiff makes absolutely noargument in support for costs. Rather, in the last paragraph of her "motion," plaintiff asks that in addition to denying defendants' motion to dismiss, the Court award plaintiff the costs for service on defendants Richinan and Benjamin. See Docket No.43 at 6. Accordingly, plaintiffs renewed motion to recover costs of service (Doc. No. 43) is **DENIED** as moot the extent is seeks to recover costs for service; otherwise, the motion is treated as a memorandum in opposition to defendants Neal, Gerber & Eisenberg's, Lawrence Benjamin's, and Lawrence Richman's motion to Dismiss.

> Before filing any motion in a civil case. . .the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement (1) certifying that the moving counsel has conferred with opposing counsel (2) stating whether counsel agree on the resolution of the motion. A certification to the effect that opposing counsel was unavailable for a conference before filing a motion is insufficient to satisfy the parties' obligation to confer.

C. Plaintiff's Motion for a More Definite Statement (Doc. No. 44)

Plaintiff's motion for a more definite statement (Doc. No. 44) is directed at defendant Abrams and Abrams & Chapman's motion to dismiss the complaint (Doc. No. 26). Plaintiff claims that pursuant to Fed.R.Civ.P. 12 (e), she requires more specificity as to certain statements made in Abrams's affidavit in support of the motion to dismiss. *See* Docket No. 44 at 1 - 2. Plaintiff is mistaken.

A motion for more definite statement is available to a party when a pleading is so vague or ambiguous that a responsive pleading cannot be framed. *See* Fed. Rul Civ. P. 12 (e). In such a situation, the responding party may move the court for an order directing the pleader to serve a more definite statement. Pleadings consist of a complaint and answer, a reply to a counterclaim or an answer to a cross-claim. *See* Fed.R.Civ.P. 7 (a). Significantly, a motion is not a pleading. *See* Fed.R.Civ.P. 7(b). Accordingly, plaintiff's motion for a more definite statement is **DENIED** to the extent it seeks a more definite statement from Abrams's affidavit; otherwise, the "motion" shall be treated as a memorandum in opposition to Abrams and Abrams & Chapman's motion to dismiss the complaint.

D. Plaintiff's Motion to Strike Declaration of Lawrence Benjamin (Doc. No. 45)

Plaintiff claims that Lawrence Benjamin's declaration at Docket No. 29 should be stricken under Fed.R.Civ.P. 12 (f) because it is impertinent and scandalous. Plaintiffs further claims that the declaration should be stricken because it was not signed under oath with notary

acknowledgment. Plaintiff is wrong.

This Court has carefully reviewed Benjamin's declaration and finds that it is not impertinent or scandalous. Additionally, Benjamin declared "under penalty of perjury that the foregoing[declaration] is true and correct." Docket No. 29 at 7. Pursuant to 28 U.S.C. § 1746, an unsworn declaration has the full force and effect of a sworn declaration and affidavit:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unswom declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths:
"I declare (or certify, verify, or State) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

28 U.S.C. § 1746.

Benjamin's signed and dated declaration fully complies fully with 28 U.S.C. § 1746.

is **DENIED**.

DONE and **ORDERED** this 24th day of April, 2003.

/s/ JAMES G. GLAZEBROOK
UNITED STATES MAGISTRATE JUDGE

Copies furnished

Counsel of Record
Unrepresented Parties

FILED
03 APR 4 PM 4:39
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

The case is before the Court *sua sponte.* The Defendants Lawrence Richman and Lawrence Benjamin filed a Motion to Extend Time to Respond to Complaint (Doc. No. 17) on March 26, 2003. In their Motion, the defendants asked for an extension to April 31, 2003. However, there is not 31 days in April. The Magistrate Judge endorsed stamped the Motion granting it on April 1, 2003 (Doc. No. 31). The Court **VACATES** that Order (Doc. No. 31) and hereby **GRANTS** the defendants' Motion to Extend Time (Doc. No. 17) giving the defendants' Richman and Benjamin until May 1, 2003 in

which to respond to the Plaintiff's Complaint.

DONE and **ORDERED** in Chambers, Orlando, Florida this 4th day of April, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 MAR 28 PM 4:40
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-OrI-19JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause came on for hearing on March 25, 2003 on the following motion:

MOTION: PLAINTIFF'S CERTIFICATION OF INTERESTED PERSONS [DOCKET NO.4] TREATED AS A MOTION FOR RECUSAL UNDER 28 U.S.C. § 455 (Doc. No.7)

FILED: February 24,2003

THEREON it is **ORDERED** that the motion is **DENIED.**

I. BACKGROUND

On January 27, 2003, plaintiff Mary Ann Smania, proceeding *pro se*, filed this legal malpractice action against three attorneys and two law firms. *See* Docket No. 1, Complaint. On February 3, 2003, Smania filed a certificate of interested persons. In that certificate, Smania claims that "there is a basis for the recusal of Magistrate Judge James G. Glazebrook." Docket No. 4 at 2. Specifically, Smania claims that recusal is warranted due to Judge Glazebrook's comments relating to the State Bar while presiding over the case of *Norma Vaughan v. Kenneth Apfel, Commissioner of Social Security*, Case No. 6:99-cv-148 1-1 8JGG.[1]

On February 24,2003, the undersigned treated the certificate of interested persons as a motion to recuse, and set the matter for a hearing on March 25,2003. See Docket No. 7. Smania and counsel for the defendants appeared at the hearing. Counsel for the defendants took

---

[1] In the Vaughan case, Smania, a non-lawyer, attempted to represent the plaintiff, NormaVaughan. The undersigned struck Vaughan's initial complaint because it was signed by Smania who had been enjoined from the unlicensed practice of law. See Docket Nos. 14 and 31,Case No. 6:99-cv-1481-I8JGG. The undersigned also prohibited Smania from representing Vaughan and referred Smania's unauthorized practice of law to the Florida Bar. See June 19, 2000 Endorsed Order, Case No. 6:99-cv- 1481-1 8JGG.

no position on the recusal issue. Smania argued that the Court had prejudiced her by treating the certificate as a motion she had not filed, and by holding the hearing.

II. RECUSAL

Section 455 (a) of28 U.S.C. states that"(a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The goal of section 455(a) is to avoid even the appearance of partiality. Actual bias is not necessary; the appearance of bias is adequate to trigger recusal under §455. *See Liteky v. United States*, 510 U.S. 540, 548 (1994).

The standard is whether ajudge should disqualify himself because a reasonable person, fully informed of the relevant facts, would question the judge's impartiality. *Parrish v. Board of Commissioners*, 524 F.2d 98, 103 (5th Cir. 1975) (holding that § 455 (a) involves a "reasonable man test"); *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation, then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case, or because the judge is pure in heart and incorruptible. *Liljeberg, Jr., v. Health Services Acquisition Co.*, 486 U.S. 847 (1988). Cases within § 455 (a) are extremely fact driven, and must be judged on their unique facts and circumstances more than by comparison to situations considered in prior jurisprudence. *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995). If the question of whether § 455 (a) requires disqualification is a close one, the balance tips in favor of recusal. *United States v. Dandy*, 998 F.2d 1344,

1349 (6th Cir. 1993).

Section 455 (a), however, must not be construed so broadly that it becomes presumptive, and recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice. *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986). Neither is the statute intended to bestow a veto power over judges, or to permit "judge-shopping." *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993). Disqualification is not warranted merely by a litigant's intemperate and scurrilous attacks. *United States v. Studley*, 783 F.2d 934(9thCir. 1986); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir.1977).

It has long been established that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge. Otherwise, "every man could evade the punishment due to his offense, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion." *Standing Committee v. Yagman*, 55 F.3d 1430, 1443 - 44 (9th Cir. 1995). *See also United States v. Wolfson,* 558 F.2d 59, 62 (2d Cir. 1977) (defendant's unfounded charges of misconduct againstjudge did not require disqualification because defendant's remarks established only the defendant's feelings towards the judge, and not the reverse).

Further, a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require. *Greenspan*, 26 F.3d at 1005; *In re American Ready Mix, Inc.*, 14 F.3d at 1501; *Hinman*, 831 F.2d at 939. The United States Court of Appeals for theTenth Circuit compiled a non-exhaustive list of matters not ordinarily sufficient to require § 455 (a) recusal:

(1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that ajudge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or anot her proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge.

Cooley, 1 F.3d at 993 - 94 (emphasis added).

III. APPLICATION

This Court has considered whether to recuse under 28 U.S.C. § 455 (a) on its own motion. In Smania's certificate of interested persons, and during this Court's March 26, 2003 hearing on this matter, Smania claimed that the undersigned's prior ruling - prohibiting her from representing plaintiff Vaughan - shows that the undersigned has a bias against non-attorneys and shows

that the undersigned is partial to members of the Florida Bar. Smania is wrong.

The undersigned has no personal bias or prejudice concerning Smania or concerning non-lawyers. Although it is illegal for a non-lawyer to represent an individual in this Court, it is perfectly appropriate for a non-lawyer to proceed *pro se* on her own behalf. The Court does what it can toaccommodate *pro se* litigants. In this case, Smania represents only herself. The undersigned judge has as strong a duty to sit in this case because there is no legitimate reason to recuse. No reasonable person, fully informed of the relevant facts, would question the undersigned judge's impartiality. Section 455 (a) is not intended to bestow a veto power over judges, or to permit "judge-shopping." Accordingly, Smania's certificate of interested persons, treated as a motion to recuse [Docket No. 4], is **DENIED**.

III. CONCLUSION

For the above reasons, it is

ORDERED that plaintiff Mary Ann Smania's Certificate of Interested Persons, treated as a Motion to Recuse [Docket No. 4] is **DENIED**.

DONE and ORDERED this 28th day of March, 2003.

/s/ JAMES G. GLAZEBROOK
UNITED STATES MAGISTRATE JUDGE

Copies furnished

Counsel of Record
Unrepresented Parties